

Issue: Group III Written Notice with demotion (failure to follow practices/policies which could have endangered the public/facility); Hearing Date: 06/13/03; Decision Issued: 06/16/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5741



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5741

Hearing Date: June 13, 2003
Decision Issued: June 16, 2003

PROCEDURAL HISTORY

On March 26, 2003, Grievant was issued a Group III Written Notice of disciplinary action with demotion for:

Failure to follow policies/practices which could have endangered the public, internal security, or affects the gate and efficient operation of the Department. Being in a position of Watch Commander requires critical thinking and sound judgment.

On April 22, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 22, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Human Resource Officer

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion and adverse salary action.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Lieutenant until his demotion to a Sergeant. After approval from the Human Resource unit within the Agency, Grievant's salary was reduced by ten percent. No evidence of prior disciplinary action against Grievant was presented.

On March 19, 2003, Grievant was the Watch Commander at one of the Agency's Institutions. Before the Captain left the Facility, he instructed Grievant to assist a new corrections officer become certified by having the corrections officer participate in a mock transportation run.¹ The Agency's practice is to have a corrections officer pretend to be an inmate as part of the mock drill. Instead, Grievant instructed the Sergeant to select an inmate to participate in the training. Without Grievant's knowledge or request, the Sergeant offered the Inmate an opportunity to receive medical treatment sooner than he would otherwise have received the medical treatment² in return for participating in the mock training. The Inmate accepted the Sergeant's offer and participated in the training.

As part of the drill, the Inmate was placed in restraints and moved outside of the institution. No entries were made in any logs to document the Inmate being moved.

¹ Transferring an inmate from a correctional facility is called a transportation run.

² Institutional Operating Procedure 718 requires inmates to submit a sick call sheet to request sick call. Medical staff review sick call sheets and schedule inmates for medical treatment based on the urgency of their medical needs.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

DOCPM 5-10 lists numerous examples of offenses. These examples “are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of agency head, although not listed in the procedure, undermines the effectiveness of agency’s activities or the employee’s performance, should be treated consistent with the provisions of this procedure.”³

Institutional Operating Procedure 415 governs the release of inmates to employees or other law enforcement agencies. Section 415-4.0 states:

Incarcerated inmates may be released to other law enforcement agencies upon command of an order from a state or federal court or upon the direction of the Director or official designee. Periodically, inmates are required to appear in the court or return to local or federal jails for official purposes. On some occasions, DOC personnel will be required to transport the inmate to and from the destination and thus maintain custody for the Department. On other occasions, instructions will be given for the inmate to be released to the custody of other law enforcement personnel.

Among the most important functions of a correctional institution is to retain inmates inside the institution except when it is appropriate to release them. The Agency’s conclusion that Grievant should not hold the rank of Lieutenant and serve as Watch Commander is supported by the evidence. Although the Inmate was appropriately restrained when he was removed from the institution, each time an inmate leaves a facility, the risk of danger to the public increases. A Watch Commander is expected to take all necessary actions to minimize that risk of danger. Grievant’s failure to exercise appropriate judgment shows the Agency’s demotion was appropriate.

Supervisors are responsible for the actions of their subordinates only if the supervisors knew or should have known of the actions taken by subordinates and had some degree of control over the actions taken by the subordinates. The Agency is attempting to hold Grievant responsible, in part, for all actions of his subordinates regardless of whether Grievant knew or should have known of their actions.

³ DOCPM § 5-10.7(C).

DOCPM § 5-22.7(C) states, "Employees shall not extend or promise to an inmate, probationer, or parolee special privileges or favors not available to all persons similarly supervised, except as provided for through official channels." By permitting the Inmate to receive non-emergency medical care before he would have otherwise have received the care, the Sergeant granted a special privilege to the Inmate. Grievant did not directly offer the Inmate any special privileges. The evidence presented showed that Grievant did not know how the Sergeant selected an inmate and was not a party to the Sergeant's offer to the Inmate of special privileges. Grievant is not responsible for the Sergeant's failure to follow DOCPM 5-22.

The Agency contends Grievant violated Post Order #64 because log books were not properly documented to reflect the Inmate's removal from the institution. Post Order #64 sets forth the responsibilities of a Corrections Officer in the area of control called "Vehicle Sally Port." Grievant was not working as a corrections officer and was not working at the Vehicle Sally Port. The Agency did not present Grievant's post order as evidence. The Hearing Officer cannot determine whether Grievant's post order requires him to take responsibility for Post Order #64. Without such evidence, the Hearing Officer must conclude that Grievant is not responsible for the duties of a correctional officer working post #64.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance.⁴

It is unfair for the Agency to discipline Grievant for the independent actions of his subordinates without showing that Grievant knew or should have known of their responsibilities and that Grievant had some control over the actions of his subordinates. The disciplinary action against Grievant reflected, in part, the Agency's assumption that Grievant was strictly liable for the actions of all of his subordinates. Thus, the Hearing Officer finds mitigating circumstances to lessen the degree of discipline taken against Grievant.

When an employee is demoted for disciplinary reasons, an adverse salary action must follow. The minimum salary reduction is 5% but in no event may the employee's salary exceed the maximum of the pay band following a disciplinary salary action. Grievant's salary was reduced by 10%. Because of mitigating circumstances, the Hearing Officer will adjust that reduction to 5% so long as Grievant's salary as a Sergeant does not exceed the maximum of the pay band following the demotion.

Grievant contends the Captain told Grievant to use an inmate as part of the mock exercise. If this were true, Grievant would have been complying with the orders of a superior. Since neither party called the Captain to testify, the incident report submitted

⁴ DOCPM § 5-10.13(B).

stands as the evidence of the Captain. The incident report does not indicate Grievant was instructed to use an inmate in the mock training.

Grievant contends the Written Notice was not properly issued because it lacks the necessary signatures. The purpose of a Written Notice is to notify an employee of the allegations against him so that he can properly defend against those allegations. The Written Notice as issued properly notifies Grievant of the Agency's allegations against him and the proposed disciplinary action to be taken. The Written Notice is properly dated and initialed by the Warden issuing the notice. Whether Grievant properly signed the Notice is not material since the evidence is clear that Grievant knew of the allegations made against him and had a complete opportunity to challenge those allegations.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion with adverse salary action is **modified**. The Agency is ordered to modify Grievant's disciplinary action to be a Group III Written Notice with demotion to Sergeant with a 5% pay reduction but not exceed the maximum of the Grievant's pay band following the demotion. The Agency is ordered to pay Grievant's **back pay** representing the difference between a 10% and 5% pay reduction from the effective date of demotion.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision

was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.